BALAKRISHNAN DEVARAJ

v.

PATWANT SINGH NIRANJAN SINGH & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO. S3-22-903-2000]
24 JUNE 2004

CIVIL PROCEDURE: *Pleadings - Statement of claim - Striking out - Paragraphs in statement of claim - Paragraphs interlinked and relevant to other claims of plaintiff - Whether such paragraphs ought to be struck out - Rules of the High Court 1980, O. 18 r. 19(1)(a)*

LEGAL PROFESSION: *Practice and etiquette - Touting - Whether touting arrangement between tout and solicitor illegal and against public policy - Whether such arrangement could constitute a valid contract between tout and solicitor - Whether tout's claims for commissions sustainable*

LEGAL PROFESSION: *Practice and etiquette - Practice and etiquette rules - Whether such rules constituted subsidiary legislation having the force of law*

The plaintiff's business was in introducing clients in accident cases to law firms. In 1991 the first defendant, was just about to set up his own law firm. He requested the plaintiff to help him (the first defendant) finance the running of the law firm. The plaintiff then entered into an oral agreement with the first defendant. It was agreed that the plaintiff would be paid a commission of 25% of the fees collected in respect of every case the plaintiff referred to the first defendant. The plaintiff was also to manage the first defendant's law firm. In 1995, the second defendant joined the first defendant as a partner. The second defendant accepted the terms of the oral agreement entered into between the first defendant and the plaintiff. The plaintiff was thus not just a tout to the defendants but also their financier and manager. The relationship between the plaintiff and the defendants subsequently soured. The plaintiff alleged that in 1996 the defendants wrongfully and in breach of the oral agreement terminated his services, barred him from entering their office and slandered him. The plaintiff thus commenced a writ action against the defendants claiming for

(i) agreed commissions, (ii) damages for slander and negligence, (iii) accounts to be furnished, (iv) quantum meruit in respect of services rendered, and (v) restitution. The defendants applied under O. 18 r. 19(1)(a) RHC 1980 to strike out certain paragraphs of the plaintiff's statement of claim. Their application was dismissed by the SAR and they appealed to the judge. The defendants submitted on appeal that the alleged agreement between the plaintiff and themselves was a touting agreement. Such an agreement, said the defendants, was unlawful or illegal and could not form a valid contractual relationship between the plaintiff and themselves (the defendants). The plaintiff's counsel however, relying on *Koid Hong Keat v. Rhina Bhar* [1989] 3 MLJ 238, argued that the touting agreement was valid.

Held (dismissing the appeal with costs):

[1] The High Court accepted the defendants' contention that the alleged agreement between the plaintiff and the defendants constituted a touting arrangement between the defendants and the plaintiff, and that such an arrangement was unlawful or illegal and therefore could not form a valid contractual relationship between the plaintiff and the defendants. However, the High Court was reluctant to strike out the specified paragraphs of the statement of claim in view of the relationship between the parties, which was akin to that of a business joint-venture. Their relationship was not a mere solicitor-tout relationship. Further, the plaintiff's statement of claim had been drafted in such a way that the narration of events and the various claims were interlinked. If the High Court were to delete the paragraphs specified by the defendants, the plaintiff's statement of claim would become incoherent and confusing and would prejudice the plaintiff's other claims which the defendants were not challenging in the striking out application. (p 214 b-f)

[2] The High Court could not agree with the views expressed in *Koid Hong Keat v. Rhina Bhar* [1989] 3 MLJ 238. The High Court would hold that a touting agreement between a solicitor and a tout is *per se* against public policy. *Koid Hong Keat v. Rhina Bhar* [1989] 3 MLJ 238 (not foll); *Re A Solicitor* [1945] 1 All ER 445 (foll); *In the matter of Phool Din & Ors* AIR [1952] Allahabad 491 (foll); *Mohamed v. Alaga & Co* [2000] 1 WLR 1815 (foll). (pp 219 f-h & 220 a-g)

[3] The Practice and Etiquette Rules are made pursuant to s. 77 of the Legal Profession Act 1976, a law enacted by Parliament. Thus the Practice and Etiquette Rules is a subsidiary (or subordinate) legislation. It is statutory law, and has the force of law like any other delegated legislation. *Koid Hong Keat v. Rhina Bhar* [1989] 3 MLJ 238 (not foll). (p 221 a-b)

[4] The touting arrangement between the plaintiff and the defendants was both illegal and against public policy in view of rr. 51 and 52(b) of the Practice and Etiquette Rules. By reason of s. 24 of the Contracts Act, the arrangement was void and unenforceable by the plaintiff against the defendants and *vice versa*. The plaintiff's claim for the touting commissions was thus unsustainable. (p 221 c)

Case(s) referred to:
In the matter of Phool Din & Ors [1952] Allahabad 491 ***(foll)***
Koid Hong Keat v. Rhina Bhar [1989] 3 MLJ 238 ***(not foll)***
McQuade v. Barnes [1949] 1 All ER 154 ***(refd)***
Mohamed v. Alaga & Co [2000] 1 WLR 1815 ***(foll)***
Re A Solicitor [1945] 1 All ER 445 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 24(a), (e)
Interpretation Acts 1948 and 1967, s. 3
Legal Profession Act 1976, s. 77
Legal Profession (Practice and Etiquette) Rules 1978, rr. 51, 52(b)
Rules of the High Court 1980, O. 18 r. 19(1)(a)

For the plaintiff - DP Vijandran (P Selvaraj with him); M/s Raj & Co
For the defendants - C Sri Kumar; M/s Sri Ram & Co

Reported by Andrew Christopher Simon

JUDGMENT

Hishamudin Yunus J:
This is an appeal by the defendants against the decision of the learned senior assistant registrar given on 31 October 2002. In her decision the learned senior assistant registrar had dismissed the defendants' interlocutory application pursuant to O. 18 r. 19(1)(a) (no reasonable cause of action disclosed) or (d) (an abuse of the process of court) of the Rules of the High Court 1980 to strike out certain paragraphs of the plaintiff's statement of claim.

I have dismissed the appeal with costs. The following are my grounds.

The plaintiff was in the business of introducing clients in accident cases to various legal firms. It is pleaded by the plaintiff that in 1991 the 1st defendant, who was then just about to set up his own legal firm, approached him and requested the plaintiff to help the 1st defendant finance the running of the 1st defendant's law firm. Accordingly, the plaintiff entered into an oral agreement with the first defendant. It was agreed that the plaintiff would be paid a commission of 25% of the fees collected in respect of every case which the plaintiff refers to the 1st defendant. In para. 6(b) of the statement of claim it is pleaded:

> (b) that a sum of RM200 shall be paid by the 1st defendant to the plaintiff … as part of initial expenses for each case brought by the plaintiff … Further all other costs as further initial expenses and cost of obtaining the police documents, specialist reports, traveling expenses to bring the client to the 1st defendant's office and to court, witness allowance for specialists to attend court and financial advances to clients and other miscellaneous expenses which were all paid as per the 1st defendant's instruction were to be borne jointly by the plaintiff and the plaintiff's partner and to be repaid immediately by the defendant upon the conclusion of the cases and receipt of fees by the 1st defendant from the client.
>
> (f) that all computers, printers, tables, chairs, law books and other goods brought by the plaintiff and/or the plaintiff's partner to the 1st defendant's office will be returned to them upon termination of the partnership.

Under the agreement, the plaintiff was to manage the 1st defendant's legal firm.

In 1995, the 2nd defendant joined the 1st defendant as a partner and accepted the terms as agreed to between the 1st defendant and the plaintiff in the oral agreement.

It will be observed that the oral agreement between the plaintiff and the defendants is not a mere touting agreement. Under the agreement, the plaintiff is also a financer and manager of the defendants' firm.

Subsequently, the relationship between the plaintiff and the defendants turned sour. The plaintiff alleges that in 1996 the defendants wrongfully and in breach of the oral agreement terminated his services.

It is further alleged by the plaintiff that he, besides being barred from entering the firm's office, was also slandered by the defendants.

The plaintiff thus commenced a writ action against the defendants claiming for the agreed commissions, for damages for slander and negligence, for accounts to be furnished, for quantum meruit in respect of services rendered, and for restitution.

At the outset I wish say that in respect of the present striking out application I accept the defendants' contention that there was in the alleged agreement between the plaintiff and the defendants a touting arrangement between the defendants and the plaintiff, and that such an arrangement was unlawful or illegal and therefore there cannot be a valid contractual relationship between the plaintiff and the defendants. However, notwithstanding this finding, I am reluctant to strike out the specified paragraphs of the statement of claim as prayed for by the defendants in their summons in chambers. This is because the relationship between the plaintiff and the defendants, as set out in detail in the statement of claim, is not merely a simple straightforward solicitor-tout relationship; nor is the claim merely a claim for touting commissions: it is more complex than that. The relationship as alleged in the statement of claim is in the nature of a business joint venture. Since their relationship is in the nature of a joint venture, the statement of claim contains other claims as well, besides the claim for commissions for touting works; these other claims being quantum meruit, damages for negligence and defamation, for furnishing of accounts and for restitution. However, the statement of claim has been drafted in such a way that the narration of events and the various claims (including the claims for the illegal touting commissions) were interlinked or intertwined. As such, if I were to delete the paragraphs specified by the defendants in their striking out application, the plaintiff's statement of claim would become incoherent and confusing and might prejudice the plaintiff's other claims which the defendants are not challenging in the present application.

That there is a touting arrangement in the joint venture agreement is clear. For, under the arrangement, the plaintiff's obligation was to introduce clients (potential litigants) to the defendants for a fee of 25%. The Legal Profession (Practice and Etiquette) Rules 1978 (hereinafter referred to as the 'Practice and Etiquette Rules) prohibits touting. It states:

> **51. Advocate and solicitor not to do or cause touting.**
>
> An advocate and solicitor shall not do or cause or allow to be done, anything for the purpose of touting directly or indirectly, or which is calculated to suggest that it is done for that purpose.

However, nowhere in the Practice and Etiquette Rules or in the Legal Profession Act 1976 or in the Interpretation Acts of 1948 and 1967 is the term 'touting' defined. In the *Chambers Concise* 20th Century Dictionary 'tout' is defined as:

> 'tout' to look out for custom in an obtrusive, aggressive or brazen way.

The *Concise Oxford Dictionary*, 10th edn. defines "tout' as:

1. attempt to sell (something), typically by a direct or persistent approach.

But the meaning of 'touting' is well understood in the legal fraternity and touting for reward is prohibited under the Practice and Etiquette Rules. Rule 52(b) provides:

> **52. No division of costs or profits with unqualified person.**
>
> It is unprofessional and improper conduct:
>
> (a) …
>
> (b) For an advocate and solicitor to pay, give, agree to pay or agree to give any commission, gratuity or valuable consideration to any unqualified person to procure or influence or for having procured or influenced any legal business and whether such payment, gift or agreement be made under pretext of services rendered or otherwise, but this rule does not prohibit the payment of ordinary bonuses to staff;

The fact that the plaintiff is a tout of the defendants does not appear to be disputed. It also appears not to be disputed that touting is prohibited by the r. 51 and r. 52(b) of the Practice and Etiquette Rules. But the plaintiff contends that he is not guilty of contravening the rules as he is not a solicitor: the rules apply only to the defendants, they being solicitors. The plaintiff argues that it is the defendants who had contravened the rules.

In passing I am unable to resist the temptation to reproduce here the opening paragraph of an interesting article in the Bombay Law Journal entitled '*The Tout'* (reproduced in the 1934 issue of The Malayan Law Journal, p. lxvi). It reads:

> Never shake hands with a tout. Don't be on bowing terms with him. Sternly forbid him your office. Avoid him as you would avoid the plague or the small pox. Fresh entrants to the profession are peculiarly amenable to tout-disease. Inexperience, a genial disposition and work-thirstiness form a favourable pool for fishing by a tout. A well dressed, well mannered and smooth tongued stranger, according to himself on the best of terms with half of the leading

> members of the legal profession in the district, has, unaccountably and generously (as you think) determined to place in your hands a very big case, success in which is certain. Will you take up the case? Can the client be brought before the presence? He is just outside your Chambers.

Lest it be misunderstood, I must pause to point here that the term 'touting' is not confined only to the legal profession. It applies to other callings as well. And this is well illustrated by the case of *McQuade v. Barnes* [1949] 1 All ER 154. In this case cited, a bye-law of the corporation of the borough of Blackpool provided:

> No person shall in any street within the borough of Blackpool, to the obstruction, annoyance, or danger of any person, either verbally or by the distribution of handbills, circulars, or advertisements, tout or importune any person for the purpose of selling any article to or obtaining the custom of such last mentioned person.

The appellant stood on the forecourt of a shop premises calling out in a loud voice to persons passing along the promenade:

> Come inside. This way for your fish and chips. No waiting.

The appellant was employed by the owner of a shop which adjoins the street. The shop sold fish and chips. The cries annoyed several persons walking on the promenade. The Magistrate's Court held that the act of the employee/appellant amounted to touting and it annoyed the members of the public that were passing by. The Court found him guilty of contravening the bye-law and he was convicted. On appeal, the conviction was upheld by the Divisional Court.

In the present appeal that is now before me, it is the contention of the defendants that the plaintiff has no cause of action in contract against the defendants in respect of the commissions for touting as the touting arrangement was illegal. The defendants argued that the oral agreement is void by reason of illegality as well as by reason of public policy. The learned counsel for the defendants relies on s. 24(a) and (e) of the Contracts Act 1950 and r. 51 and r. 52(b) of the Practice and Etiquette Rules.

The provisions of r. 51 and r. 52(b) have been set out earlier in this judgment. Section 24 of the Contracts Act 1950 provides:

24. What considerations and objects are lawful, and what not.

The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

In *Re A Solicitor* [1945] 1 All ER 445 Scott LJ had this to say regarding touting:

> 'Touting' for clients is, like advertising, fundamentally inconsistent with the interest of the public and with the honour of the profession. The function of a solicitor is to advise or negotiate or fight for a client, but only if retained. The client may seek him, but he must not seek the client. And this rule of conduct must be made a reality, and not evaded by the subterfuge of getting some laymen to do the touting for him. To ensure the success of this fundamental policy of the profession, in the case of accident claims, where in practice the danger is greatest, a veto is laid down in r. 4(B) against accepting clients who have been brought to him by lay touts.

In the case of *In the matter of Phool Din & Ors.* AIR [1952] Allahabad 491 the court had this to say on the practice of touting:

> 15. Legal profession is one of the honourable professions. Every litigant should be at liberty to find out for himself as to which lawyer will render him the best service. If he engages a lawyer through a tout, the tout is likely to take him to a lawyer who gives him the largest remuneration. A tout would not be concerned with affording the best service to a litigant. The litigant may thus be deprived of the best service. The system of toutism is bound to corrupt the legal profession. A most talented lawyer may not be able to get work because he does not stoop down to accept an engagement through a tout; but a lawyer who has no scruples to accept employment through a tout may have large work, because he gives a large share of his remuneration to the tout. The administration of justice itself may be affected by permitting toutism, as the courts may not have the advantage of the services of the best lawyers before them. We have no doubt in our mind that it is not in public interest to permit toutism. The provisions in the Legal Practitioners Act in respect of touts are saved by cl (6) of art 19.

> 16. There is no comparison between the profession of a broker and that of a tout. A broker is an intermediary between a seller and a purchaser. The purchaser sees the commodity he buys or gives the particulars of the kind of commodity he propose to buy. There is little likelihood of his deception. In the very nature of things such is not the position in regard to employment of a lawyer by a litigant. The institution of brokers has long been recognized by the society. The society has not shown its abhorrence of it, by prohibiting it. On the other hand, toutism is prohibited by the Legal Practitioners Act. The society abhors it. Laws are reflections of the public opinion. The provisions relating to touts in the law show the abhorrence of the society towards this profession. Touts and lawyers who accept engagement through touts are looked down upon by the society.

The learned counsel for the plaintiff, on the other hand, submitted that the touting agreement is valid. Counsel relies on *Koid Hong Keat v. Rhina Bhar* [1989] 3 MLJ 238. In this case cited, the defendant was an advocate and solicitor who sought to strike out the plaintiff's action pursuant O. 18 r. 19 of the Rules of the High Court 1980. The defendant had entered into an oral agreement with the plaintiff whereby it was agreed that the plaintiff would be paid 10% of the fees collected by the defendant upon the conclusion of each case referred to the defendant for consultation or legal proceeding. The defendant claimed that the oral agreement amounted to touting and since touting is contrary to public policy, the alleged agreement was unenforceable under s. 24 of the Contracts Act. Wan Adnan J (as he then was), in dismissing the defendant's application, said:

> The Legal Profession (Practice and etiquette) Rules 1978 were made by the Bar Council pursuant to s. 77 of the Legal Profession Act 1976 which states as follows:
>
> 77 Power to make rules regulating practice etc
>
> (1) Without prejudice to any other power to make rules provided under this Act, the Bar Council may, with the approval of the Attorney General, make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.
>
> (2) Any rules made pursuant to this section shall not come into operation until they have been published in the Gazette.
>
> (3) Any advocate and solicitor who fails to comply with any rules made under this section may be liable to disciplinary proceedings.
>
> (4) The Attorney General may, by order published in the Gazette, make such modifications as he deems necessary to any rules made and published under this section before the coming into operation of this subsection.

In my view, before the court can regard touting as opposed to public policy under s. 24(e) of the Contracts Act 1950 there must be shown to the court that touting has a tendency to be injurious to the public welfare. The Legal Profession (Practice and Etiquette) Rules 1978 were made by the Bar Council 'for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.' They do not apply to other people. The rules were not made by Parliament. They therefore cannot be taken to reflect public opinion. Has public opinion been expressed in this matter? I have not been informed of and I have not come across any expression of opinion from the public either for or against touting. The society has not shown its abhorrence to touting. If the prohibitions in rr. 51 and 52 are statutory provisions I will have no hesitation to hold that touting is injurious to the public welfare because 'laws are reflections of the public opinion.' *(In the matter of Phool Din & Ors.).*

The case of *Re A Solicitor* was a disciplinary proceeding. It is not directly relevant to the present case. In any event it is an old case.

> The law relating to public policy must change with the passage of time, it cannot remain immutable: *Nagle v. Feilden* [1966] 2 WLR 1027.

Further, what is injurious to public welfare in England may not necessarily be so in Malaysia and *vice versa.* What is and what is not injurious to public welfare in Malaysia must be decided in the Malaysian context.

In the present case on the affidavit evidence alone I cannot decide whether or not touting is injurious to public welfare. The court should not in my view just impose its own opinion on the matter. The court should be sensitive to the feelings of the general public. Before making its decision the court should be made aware of such feelings.

The learned judge appears to have the following views. Firstly, he is of the view that touting per se by solicitors is not against public policy and therefore a touting agreement between a solicitor and a tout is not invalidated by s. 24(e) of the Contracts Act. Secondly, whilst accepting that touting is prohibited by r. 51 and r. 52(b) of the Practice and Etiquette Rules, the learned judge is of the view that rr. 51 and 52 are not statutory provisions. With respect, I am unable to agree with either of the above views of the learned judge. In my opinion, a touting agreement between a solicitor and a tout is *per se* against public policy. This is clearly reflected in the passages in the cases of *Re A Solicitor* and *In the matter of Phool Din & Ors* cited above. In addition, to reinforce my stand, I also wish to quote the following passage from the English Court of Appeal case of *Mohamed v. Alaga & Co.* [2000] 1 WLR 1815 wherein Lord Bingham of Cornhill CJ said (at p. 1820):

Deputy Master Price ordered the determination of a preliminary issue: whether the plaintiff's claim cannot in law succeed by reason of the unlawfulness of the contract pleaded under rule 7 of the Solicitors' Practice Rules 1990. That issue was determined by Master Bragge on 4 November 1997, who ruled in favour of the plaintiff.

There was then, however, an appeal to Lightman J [1998] 2 All ER 720, who heard argument on 16 March 1998 and delivered reserved judgment in writing on 25 March. He said at the outset of his judgment, at p. 722:

> The issue is short, but of some public importance, namely whether an agreement with a solicitor for the payment of a share of the fees earned by that solicitor in consideration of the introduction of clients and the provision of other associated services is legally enforceable, and if it is not enforceable, whether the other party has a claim against the solicitor in restitution for the value of the introductions and the services which he has rendered.

The judge recorded that, for the purposes of the legal argument, he was making two factual assumptions in favour of the plaintiff: first, that the agreement alleged had been made; and second, that the plaintiff was unaware of any prohibition on fee-sharing agreements. The judge made reference to the Solicitors Act 1974, to the Solicitors' Practice Rules 1990, and to the Solicitors' Introduction and Referral Code, to which I shall return. He outlined the considerations which he understood to underpin the Practice Rules, at p. 724:

> How necessary these regulations are to protect the interests of clients and the interest of the public is easy to see. It is most undesirable that there should be a trade in referrals to a solicitor, where the sole consideration in the mind of the person making the referral should be the best interests of the person referred and not personal gain. The existence of an agreement to give a reward or to share fees creates the unacceptable of exploitation of those in need of legal advice and assistance and of referrals and introductions which are not in the client's interest being made for pecuniary gain. The existence of the agreement and the relationship of the solicitor and the party to the agreement may be incompatible with the duty of undivided loyalty owed by the solicitor to the client, and creates the risk of the solicitor being influenced by his fee-sharer into giving advice which is not in the particular client's best interests in order not to offend the fee-sharer (see Cordery on Solicitors (1997 ed.), vol. 1, E, para. 233).

With respect, I am also unable to share the view of Wan Adnan J that the Practice and Etiquette Rules are not statutory provisions. The Practice and Etiquette Rules are made pursuant to s. 77 of the Legal Profession Act 1976, a law enacted by Parliament. Thus the Practice and Etiquette Rules is a subsidiary (or subordinate) legislation; it is statutory law, and has the force of law like any other delegated legislation. Section 3 of the Interpretation Acts 1948 and 1967 define 'subsidiary legislation' as:

> 'subsidiary legislation' means any proclamation, rule, regulation, order, notification, by-law or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect.

Having said the above, the conclusion that I wish to make now is that the touting arrangement between the plaintiff and the defendants is both illegal and against public policy by reason of r. 51 and r. 52(b) of the Practice and Etiquette Rules; and thus, by reason of s. 24 of the Contracts Act, is void and unenforceable by the plaintiff against the defendants (and *vice versa*). Therefore the plaintiff's claim for the commissions for touting works is unsustainable.

However, to repeat what has already been stated at beginning of this judgment, the plaintiff's claim against the defendant is not merely for the payment of commissions under the touting arrangement. There is also an allegation in the statement of claim of moneys advanced to the defendants by the plaintiff for litigation purposes with the understanding that they were to be reimbursed to the plaintiff by the defendants in due course and of the supply of office equipments to the office of the defendants' law firm by the plaintiff. There is also a claim for defamation, a claim in negligence, a claim for accounts to be furnished, and a claim in quantum meruit (for services rendered to the defendants other than touting for them), and a claim for restitution (for example, the return of office equipments to the plaintiff). And it is significant to note that the defendants' application to strike out the specified paragraphs in the statement of claim is silent on these other claims. Indeed, the focus of the defendants' striking out application was merely on the touting arrangement and the plaintiff's claim for commissions for touting works. This being the case, my adverse ruling on the validity of the plaintiff's claim for touting commissions should not preclude the case from proceeding to trial on the remaining claims of the plaintiff. Since the case is to proceed for trial on the other claims or issues mentioned, I have to be cautious in considering the defendants' application

to strike out the paragraphs in the statement as specified by the defendants. And having given due consideration to the fact that by striking out the specified paragraphs would make the plaintiff's pleading incoherent and confusing and might prejudice the other claims, I declined to grant the defendants' application to strike out the specified paragraphs.

[Appeal dismissed with costs]